NO. 79-1841

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

SUPREME COURT, U.S.
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GRANDDAD BREAD, INC.,
Petitioner,

v.

CONTINENTAL BAKING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ISSUES

This Petition for Certiorari presents questions dealing with the appropriateness in a Sherman antitrust action of labor law decisions interpreting the National Labor Relations Act. Specifically does anti-competitive conduct (a group boycott) receive immunity from attack under the Sherman Act because labor's motive was lawful work preservation?

Is an agreement in restraint of trade that violates sections 1 and 2 of the Sherman Act to be judged within the labor exemption to the antitrust laws on the basis of National Labor Relations Act criteria for determining the validity of labor union-employer agreements to cease or refrain from doing business with third parties?

A judgment on three jury findings of conspiracy in violation of sections 1 and 2 of the Sherman Act found by the district court to be supported by substantial evidence was ordered vacated on the authority of Connell Construction Co. v. Plumbers & Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975) because the jury should not have been allowed to consider the "labor related aspects" of the case.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General does not challenge as inappropriate for review by this Court the central questions presented by the Petition for Certiorari. His argument assumes without authority that where evidence of a conspiracy in restraint of trade includes reference to the provisions of a collective bargaining agreement, the question of immunity of such a conspiracy from antitrust enforcement is to be determined by reference to labor law decisions. This is the central question tendered for review. This question has not been decided by this Court.

The Solicitor General adopts the proposition of the court of appeals that "the jury should not have been allowed to consider" "the labor related aspects of this case" "because Article IV [of the collective bargaining agreement] was a valid work preservation clause".

The court of appeals cited two labor cases, National Woodwork Manufacturers Ass'n v. NLRB (1967)*, 386 U.S. 612, 18 L. Ed. 2d 357, 87 S. Ct. 1250, and NLRB v. Pipefitters, 429 U.S. 507, 51 L. Ed. 2d 1, 97 S. Ct. 891 (1977). See opinion of the court Granddad Bread Inc. v. Continental Baking Company, (Pet. App. A-8, A-6 to A-7).

The Solicitor General states:

> The lawfulness of such agreements rests not on the absence of effects outside the bargaining unit, but on the objectives of the union in entering into the agreements.

Memorandum for the United States at pp. 3-4 pp. 3-4, citing the additional labor case, NLRB v. International Longshoremen's

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* The court in National Woodwork expressly stated it did not decide there the question of "the antitrust limitations, if any, upon union-employer work preservation agreements", or "where the workers carry on a boycott to reach out to monopolize jobs", at footnote 19, 386 U.S. 612 at 631. This is certainly the sense given to National Woodwork by NLRB v. Pipefitters, 429 U.S. at p. 528, f.n. 16, at p. 529-530.

Assn., ____ U.S. ____ 65 L. Ed. 289, 100 S. Ct. _____ (1980).

The memorandum of the Solicitor General is devoid of any legislative or decisional authority whatsoever construing the antitrust laws or otherwise supporting this proposition in an antitrust context as opposed to a case arising under the National Labor Relations Act*.

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* At p. 3 of his Memorandum, the Solicitor General argues Article IV does not violate §8(e) of the NLRA. Article IV was properly considered by the jury along with all the rest of the evidence tending to establish a consipiracy. Although there was no specific finding by the jury that Article IV violated §8(e) of the NLRA this conclusion can be inferred from the jury's answer to Question 1(a) (Pet. App. A-40) in response to the District Court's Instruction that "Article IV of the collective bargaining agreement could form the basis for a conspiracy charge if you find by a preponderance of the evidence that the purpose underlying that Article was a jointly shared desire and purpose of the Teamsters and the bakers to injure or limit the business of others who had not signed that agreement". Pet. App. A-50. Whether Article IV violates §8(e) or not does not preclude its consideration by the jury under the undisputed instructions on the labor issue.

The Solicitor General thus assumes without argument or citation answers to three of the central questions presented by this Petition for Writ of Certiorari*.

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* Questions Presented for Review I: "Whether a conspiracy in restraint of trade (group boycott) found by the jury to be violative of Sections 1 and 2 of the Sherman Act is nevertheless immune from antitrust enforcement because the evidence in support of the conspiracy included reference to the provisions of a collective bargaining agreement?" (Pet. p.2)

Questions Presented for Review II: "Whether an illegal (violative of National Labor Relations Act Section 8(e)) secondary boycott provision, contained in a labor-management collective bargaining agreement receives immunity from attack under the Sherman Act by a showing that under labor law decisions construing 8(e) labor's motive for the provision was lawful work preservation, and management possessed a right of control over method of delivery of product; and in addition, are these questions for the jury upon proper instruction or rather for the court?" (Pet. p.3)

Questions Presented for Review III: "Whether the criteria developed for determining the validity under the National Labor Relations Act of labor union-employer agreements to cease or refrain from doing business with third persons apply in determining under the Sherman Antitrust Act whether an agreement in restraint of trade

The Solicitor General assumes that a boycott provision in a collective bargaining agreement is immune from attack under the Sherman Act by showing that under labor law decisions labor's motive was lawful work preservation. (Memorandum of the United States, pp.3-4).

The Solicitor General's Memorandum also assumes without argument or authority that criteria developed in decisions under the National Labor Relations Act apply in determining under the Sherman Act whether an agreement in restraint of trade is immune because of the labor exemption to the antitrust laws. (Ibid.)

The analysis by the court of appeals and the assumptions of the Solicitor

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between a labor union and wholesale bakeries to refuse to do business and boycott any business entity which engages in certain methods of distribution is immune because of the labor exemption to the antitrust laws?" (Pet. p.3)

General are erroneous because their consideration of these two issues and the effect of Article IV in a Sherman Act conspiracy case is measured and circumscribed by the National Labor Relations Act and the labor cases construing its provisions.

The conclusion they reach that Article IV and the "labor related aspects of the case" must be withdrawn from consideration by the jury cannot be squared with the right of trial by jury which is "an essential part of the congressional plan" in a treble damage action under the Sherman Act, Beacon Theatres v. Westover, 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959).

The labor policy established by the National Labor Relations Act and decisions interpreting it arise in a totally different context than the policy of the Sherman Act and decisions dealing with anti-competitive conduct involved in collective

bargaining under the Sherman Act. The decision here and the assumptions made by the Solicitor General in his brief do violence to the general principles laid down by this Court for dealing with anti-competitive conduct under the Sherman Act in a collective bargaining context. See Petition herein at pp. 25-27; pp. 33-37.

The Solicitor General ignores the question presented by petitioner - to what extent is anti-competitive conduct which occurs in the exercise of labor's right to preserve jobs circumscribed by the antitrust laws.

Anti-competitive conduct such as that implementing Article IV may or may not be valid under the National Labor Relations Act. It should not however be excluded from a jury's scrutiny when it forms a link in a price-fixing conspiracy which seeks to exclude price-cutting competitors from the market. Allen Bradley Co. v.

Electrical Workers, 325 U.S. 797, 89 L. Ed. 1939, 165 S. Ct. 1533 (1945).

The district court here instructed the jury that Article IV could be considered if:

> [Y]ou find that the union was acting pursuant to the lawful interests of its members to preserve traditional jobs fairly claimable by the bargaining unit and was in fact acting in consort with or as an agent of the bakers to boycott the plaintiff.

(Pet. App. A-51); and:

> [T]hat Article IV of the collective bargaining agreement could form the basis for a conspiracy charge if you find by a preponderance of the evidence that the purpose underlying that article was a jointly shared desire and purpose of the Teamsters and the bakers to injure or limit the business of others who had not signed that agreement.

(Pet. App. A-50).

The jury did find such a conspiracy existed, the district court found substantial evidence in the record to support each of the jury's conspiracy findings, and judgment was entered on them. (Pet. App. p. 53, 57-58)

That there was a boycott here has not been denied. See Pet. pp. 5-6. Respondent admits "the Seattle bakers could not sell Granddad these items because of Article IV" (Brief of Respondent at p. 4). Thus the boycott was directed at third parties who had not signed the agreement*.

Respondent could hardly deny there was a boycott in view of the express language of the agreement:

> [I]t is specifically agreed that each employer shall refrain from entering into any agreement or arrangement of any kind with any new or existing customer which shall result in the use of dock delivery, dock pick-up or dock shipment of any bakery products.

Article IV(D) Collective Bargaining Agreement of 1962, Pet. App. A-23.

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* This demonstrates the inaccuracy of the statement "Granddad could not have been within the comtemplation of the parties since it was not in existence at the time that Article IV was made a part of the collective bargaining agreement". Pet. App. A-7 - A-8.

The Solicitor General argues "the lawfulness of Article IV rests . . . on the objectives of the union in entering into the agreement" and "Local 227 had no objective other than preserving its members' jobs" (Memorandum of Solicitor General at p. 4).

This reasoning would eliminate any consideration of motives or purpose developed after the agreement was entered, or the intent, motive or purpose of the signatory bakeries and their subsequent conduct involving Article IV.

This argument demonstrates again the fallacious assumption underlying the Solicitor General's memorandum, that NLRA criteria control in an antitrust case.

The Solicitor General's reference to Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S. Ct.

535, 93 L.Ed. 672 (1949) is singularly inappropriate. That case deals with a nonjury trial to the court and the setting aside of findings made by the district court. That decision is distinguishable and not in point here as Atlantic & Gulf Stevedores v. Ellerman Lines Ltd., 396 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780 (1962) clearly demonstrates. Ellerman deals with special interrogatories submitted to a jury and a judgment on the jury's answers which was partially reversed by the court of appeals. This Court stated:

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says, "no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law". . .

(p. 359).

> As we recently stated in another diversity case, it is the Seventh Amendment that fashions "the federal policy favoing jury decisions of disputed fact questions. Byrd v. Blueridge Cooperative, 356 U.S. 525, 538." . . .

(p. 360).

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

(p. 364).

The error underlying the "findings" of the district court is evident in its order granting motion for judgment n.o.v. (Pet. App. A-47 - A-48). The district court's conclusion "the jury should not have been permitted to consider Article IV of the collective bargaining agreement" was predicated on the premise "that Article IV was a valid work preservation clause and therefore could not form the basis of any antitrust claim, since no evidence was

presented that the clause was unlawfully formulated or applied" and "the remaining evidence is insufficient to sustain the jury's verdict under Interrogatories Nos. 1(b) and 4". No "finding" that Article IV was not "unlawfully formulated or applied" under labor law decisions can overcome its character as a group boycott, nor as noted above is it disputed the boycott was put into effect against third persons. See Pet. 24-25; 7-9.

The error is that the district court first made a determination that Article IV was "a valid work preservation clause" as that term is defined and understood under the National Labor Relations Act and then concluded that it should not have been placed in evidence before the jury. The district court then considered "the remaining evidence". This was clearly and substantially erroneous. The issue is not the validity of Article IV under the NLRA

but as the district court correctly instructed the jury whether Article IV in the context of "the remaining evidence" was used as a boycott to injure the business of nonsignatories and therefore was a link in a price-fixing conspiracy to exclude competitors*.

This process of reasoning was followed by the court of appeals which agreed "that Article IV of the collective bargaining agreement was a valid work preservation clause and that the jury should not have been allowed to consider it as a basis for imposing antitrust liability". (Pet. App. p. A-6) Having ruled Article IV out as evidence which the jury should not have considered because it was valid under the

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* Respondent acknowledges both the district court and the court of appeals first made a finding as to Article IV, standing alone and out of the context of the remaining evidence, and then proceeded to a finding based on the remaining evidence. Brief of Respondent at p. 6.

NLRA, the court of appeals then dealt with the "non-labor related aspects of the case". (Pet. App. p. A-9) Petitioner urges that this constitutes substantial error. Measuring Article IV standing alone by NLRA standards and then removing it from consideration by the jury would eviscerate the conspiracy proof and make it impossible to demonstrate the overall conspiracy. (Petition at pp. 34, 30-34). Questions of motive, purpose and intent do not become issues to be decided by the court because the evidence in support of the conspiracy includes references to provisions of a collective bargaining agreement.

The argument appearing at 2(b) (Memorandum for the United States at pp. 4-5) demonstrates the Solicitor General ignores or wholly fails to grasp the questions presented for review and the reasons for granting the writ presented by this petition.

The three conspiracy verdicts returned by the jury after having been found by the district court to be supported by substantial evidence, were vacated solely because of the erroneous conclusion of the district court and the court of appeals that Connell Construction Co. v. Plumbers and Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975) compelled this result. Connell however did not deal with a restraint in a collective bargaining agreement. The court expressly recognized this in stating "there can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement", 421 U.S. 625. The mistake in reading of Connell by both of the courts below is that because Article IV was included in a collective bargaining agreement and when measured by

NLRA was valid that therefore it was immune from consideration by the jury in a Sherman antitrust case. This issue is clearly presented in the petition for the writ under questions I, II and III presented for review. (Pet. pp. 2-4) The Connell case does not warrant such a conclusion which is contrary to the Decisions of this Court. Provisions of a collective bargaining agreement such as Article IV here and other "labor related" anti-competitive conduct should be admitted to be considered by the jury in determining whether or not there is a "broad substantive conspiracy" in violation of the antitrust laws. See Pet. 24-40.

Finally, the Solicitor General misstates petitioner's contention at p. 4 of his Memorandum:

> There is no reason to grant review of Granddad's contention that Article IV standing by itself may give rise to antitrust liability.

However petitioner stated:

> If the holding of California Dump Truck stands for the proposition 'a valid collective bargaining agreement . . . by itself does not violate the antitrust laws,' that case is perfectly in accord with the Jewel Tea case and other decisions of this Court. It is not a precedent giving labor immunity for anticompetitive conduct in a collective bargaining context, which forms a link in a larger conspiracy.

(Pet. p. 36)

It is within the public interest for the Court to grant this petition for certiorari. The three conspiracy findings of the jury which are basic and inherent subjects for jury determination involving motive, intent and purpose were held by the district court to be supported by substantial evidence. These findings were vacated solely on account of the mistaken application of Connell Construction Co. v. Plumbers & Steamfitters, Local 100, supra.

In so doing the court of appeals has effected a significant and erroneous

incursion by the use of labor law decisions into the policy and reach of the Sherman Anit-Trust Act. This confrontation between the Sherman Anit-Trust Act and the National Labor Relations Act should be resolved.

Respectfully submitted,

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